

BUCKET FILE COPY  
ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 94M-191  
41266

In re Applications of

MAR 25 2 02 PM '94 Docket No. 94-10

The Lutheran Church/  
Missouri Synod

File Nos. BR- 890929VC  
BRH-890929VB

DISC BY

For Renewal of Licenses of  
Stations KFUE/KFUE-FM  
Clayton, Missouri

MEMORANDUM OPINION AND ORDER

Issued: March 24, 1994

Released: March 25, 1994

1. Under consideration are: (a) a Motion to Modify Hearing Issues, filed on February 22, 1994, by the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP ("NAACP"); (b) an opposition to (a), filed on March 9, 1994, by The Lutheran Church/Missouri Synod ("KFUE"); (c) an opposition to (a), filed on March 9, 1994, by the Mass Media Bureau ("Bureau"); and (d) a consolidated reply to (b) and (c), filed by the NAACP on March 18, 1994.

2. The Hearing Designation Order in this proceeding, FCC 94-23, released February 1, 1994 ("HDO"), specified the following issue (Issue 1) against KFUE:

To determine the extent to which the licensee of  
Stations KFUE/KFUE-FM complied with the affirmative  
action provisions specified in Section 73.2080(b) of the  
Commission's Rules, 47 C.F.R. § 73.2080[.]

The NAACP requests the modification of this issue by the addition of the underlined language below:

To determine the extent to which the licensee of  
Stations KFUE/KFUE-FM complied with the  
nondiscrimination and affirmative action provisions  
specified in Sections 73.2080(a) and 73.2080(b) of the  
Commission's Rules, 47 C.F.R. § 73.2080[.]

3. The NAACP contends that its request is based "upon an apparent drafting error in the HDO, . . . ." In support, the NAACP argues that the HDO makes preliminary findings that implicate KFUE's noncompliance with the nondiscrimination requirement of Section 73.2080(a) of the Rules. Specifically, the NAACP maintains that the HDO found that the licensee recruited on the basis of racial stereotypes, and that the licensee's reasons for its failure to conduct recruitment at its FM station were inherently discriminatory. Since the Commission was silent as to why it did not translate these "finding[s] of probable discrimination" into Issue 1, the NAACP alleges that inadvertent error must be inferred and that the issue must be modified.

4. Both KFUD and the Bureau oppose the NAACP's motion. KFUD argues that the HDO considered all of the NAACP's arguments but, nevertheless, specified Issue 1 as presently framed. In addition, KFUD contends that this proceeding is not about overt or intentional racial discrimination, but concerns the adequacy of the licensee's affirmative action program and recruitment process. Thus, KFUD avers that Issue 1 was properly framed. The Bureau alleges that the NAACP has misread the relevant portion of the HDO in that the Commission was concerned about the licensee's recruiting practices. The Bureau also argues that Section 73.2080(a) relates to a situation where there has been discrimination against a particular person or persons. The Bureau states that where there has been a general failure to institute a program to insure that no group has been discriminated against, the applicable rule is Section 73.2080(b). The NAACP replied to the licensee's and the Bureau's oppositions.

5. The NAACP's motion will be granted and Issue 1 will be modified as requested. At paragraph 26 of the HDO, after summarizing and rejecting the licensee's arguments, the Commission concluded "that substantial and material questions of fact exist [as] to whether the licensee's employment practices are discriminatory in violation of our EEO rule, 47 C.F.R. § 73.2080." (Emphasis added.)<sup>1</sup> It appears from this language that the Commission intended an evidentiary inquiry into the nondiscrimination portion of Section 73.2080, i.e., subsection (a), and did not intend such inquiry to be limited solely to the licensee's affirmative action and recruiting practices, i.e., subsection (b). However, the issue specified for hearing fails to refer to the nondiscrimination provision of subsection (a). Under these circumstances, the modification of Issue 1 to include such reference would maintain the maximum flexibility and ensure the development of a full and complete record on the licensee's compliance with the requirements of the Commission's EEO rule, 47 C.F.R. § 73.2080.

Accordingly, IT IS ORDERED that the Motion to Modify Hearing Issues filed by the NAACP on February 22, 1994, IS GRANTED, and Issue 1 IS MODIFIED to read as follows:

To determine the extent to which the licensee of Stations KFUD/KFUD-FM complied with the nondiscrimination and affirmative action provisions specified in Sections 73.2080(a) and 73.2080(b) of the Commission's Rules, 47 C.F.R. § 73.2080[.]

FEDERAL COMMUNICATIONS COMMISSION

*Arthur I. Steinberg*

Arthur I. Steinberg  
Administrative Law Judge

<sup>1</sup> See also paragraph 25 of the HDO, where the Commission stated: "It would appear that the licensee's reasons for its failure to conduct recruitment at the FM station are inherently discriminatory and not based on the results of any actual recruitment efforts." (Emphasis added; footnote omitted.)